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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 391

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

ELIZABETH C. JACOBS, Executrix of the Last Will
and Testament of W. FRANCIS JACOBS, Deceased,
Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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OPINIONS BELOW.

The memorandum opinion of the District Court (R. 70-75) is unreported. The opinion of the Circuit Court of Appeals (R. 88-92), is reported in 97 F. (2d) 784.

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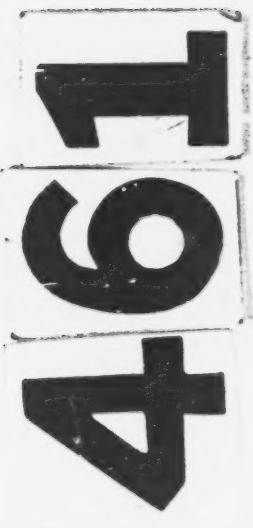
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JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 28, 1938 (R. 92). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether under the Revenue Act of 1924 the survivor's half of property acquired in joint tenancy prior to the enactment of the Revenue Act of 1916 may be included in the gross estate of the decedent who furnished the purchase price therefor.

STATUTE INVOLVED.

The statute involved is Revenue Act of 1924, c. 234, 43 Stat. 253:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate

to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishments of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

STATEMENT.

No statement of the case is necessary in addition to the statement set forth in the petition.

ARGUMENT.

1. The court below held (1) that Mrs. Jacobs acquired title to one-half of the joint tenancy real estate here in question upon the acquisition thereof in joint tenancy by Dr. and Mrs. Jacobs in 1909 and (2) that the half interest in this jointly owned real estate which Mrs. Jacobs had so acquired prior to the enactment of any Federal estate tax law was not subject to tax upon the death of Dr. Jacobs because such tax could only be imposed by giving an invalid retroactive construction to the Revenue Act of 1924.

In holding that Mrs. Jacobs acquired title to and control of one-half of the joint tenancy real estate upon the acquisition thereof in joint tenancy by Dr. and Mrs. Jacobs in 1909, the court below followed the settled law of Illinois as to the nature of the interests of joint tenants in jointly owned property as set forth in the Illinois cases cited in the opinion of the court and followed the law announced by this court as to the nature of such interests in the cases of *Knox v. McElligott*, 258 U. S. 546, and *Cahn v. U. S.*, 297 U. S. 691.

In holding that the half interest in this jointly owned real estate which Mrs. Jacobs acquired, owned, and enjoyed prior to the enactment of any Federal estate tax law was not subject to tax upon the death of Dr. Jacobs, the court below pointed out that to hold the same taxable involved giving an invalid retroactive effect to the Revenue Act of 1924 which would be opposed to the reasoning of this court in the cases of *Helvering v. Helmholz*, 296 U. S. 93; *Nichols v. Coolidge*, 274 U. S. 531, and *Hassett v. Welch*, 303 U. S. 303. Compare *Industrial Trust Co. v. United States*, 296 U. S. 220.

2. The decision below does not conflict with *Tyler v. United States*, 281 U. S. 497; *Third National Bank & Trust Company v. White*, 287 U. S. 577; *Helvering v. Bowers*, 303 U. S. 618, and *Foster v. Commissioner*, 303 U. S. 618, as alleged by petitioner.

All of these cases, except the *Foster* case, were *tenancy by the entirety* cases. The court below pointed out the essential differences between joint tenancies and tenancies by the entirety.

These essential differences have been recognized in decisions of this court which permit the inclusion in a decedent's gross estate of the full value of tenancies by the entirety created before 1916, but require the exclusion of the survivor's half of joint tenancies created before 1916.

This is evident from the *Tyler* case which arose under the Revenue Acts of 1916 and 1921 in which this court viewed the entire property held in tenancies by the entirety as passing at death because of the dominion over the survivor's interest which the decedent had retained due to the essential characteristics of such tenancies among which were that "neither can dispose of any part of the estate without the consent of the other." (P. 501.)

This is also evident from the *Third National Bank* and *Bowers* cases. Both of these cases arose after the retroactive provision of Section 302(h) of the Revenue Act of 1924 and involved tenancies by the entirety created before 1916; yet neither referred to this retroactive provision but simply cited the *Tyler* case. It is therefore clear that this Court would have reached the same result in the *Third National Bank* and *Bowers* cases had those cases arisen under revenue acts enacted prior to 1924. (*Goodenough v. Commissioner*, 83 F. (2d) 389.)

The contrary is true of joint tenancies. This is evident from the cases of *Knox v. McElligott*, 258 U. S. 546, and *Cahn v. United States*, 297 U. S. 691, in which this Court held that the survivor's interest in a joint tenancy could not be included in the gross estate of the first to die, the decedent having contributed the full purchase price. The decision in the *Knox* case was premised upon this Court's reluctance to hold the estate tax law invalid. This might have been required by construing the Congressional intent as including in the gross estate of Jonas Kissam the full value of the survivor's interest in the joint tenancy when "at the time the statute was passed Cornelia Kissam's interest belonged to her," and "in respect of which Jonas Kissam had in his lifetime no longer either title or control." (P. 548.)

There is nothing to reflect on the principle of the *Knox* case or of the *Jacobs* case in any of the joint tenancy cases cited by petitioner. The *Foster* case involved a joint tenancy created in 1930 and therefore had no retroactive element. The case of *Gwinn v. Commissioner*, 287 U. S. 224, involved only the decedent's half interest in the joint tenancy property and, as the petitioner states, was grounded on the *Tyler* case. There is no question that the half interest of the decedent passed at death and the language of the *Tyler* case is therefore appropriate. See *Griswold v. Helvering*, 290 U. S. 56.

3. The decision of the court below simply confirms the distinction between joint tenancies and tenancies by the entirety recognized in decisions of this court. The principle, moreover, is one of diminishing importance because of the fact that as to joint tenancies created after 1916 the law has been settled in favor of taxability.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be denied.

HUGH W. McCULLOCH,
Counsel for Petitioner.